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1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next this morning in Case 09-1272, Kentucky v.  
5 King.

6 Mr. Farley.

7 ORAL ARGUMENT OF JOSHUA D. FARLEY

8 ON BEHALF OF THE PETITIONER

9 MR. FARLEY: Mr. Chief Justice, and may it  
10 please the Court:

11 The issue before you today, of whether or  
12 not police can impermissibly create exigent  
13 circumstances, arises from the improper suppression of  
14 reasonably seized evidence after a reasonable  
15 warrantless entry. The test set forth by the Kentucky  
16 Supreme Court is improper for several reasons, the first  
17 of which is that this Court has routinely held that the  
18 subjective intent of police officers when effecting a  
19 warrantless entry is irrelevant.

20 JUSTICE GINSBURG: Where did the -- where  
21 did the Kentucky Supreme Court -- where did the Kentucky  
22 Supreme Court say that it was looking to a subjective  
23 state of mind on the part of the police?

24 MR. FARLEY: Well, the Kentucky Supreme  
25 Court's first prong of their test, and I believe it's in

1   our petition appendix on page 26 -- I'm sorry. Their --  
2   their discussion starts on page 44a and carries over to  
3   46A. The first question of their test is whether or not  
4   the officers acted in bad faith in an attempt to  
5   purposefully evade the warrant requirements.

6                   JUSTICE GINSBURG: That didn't -- that  
7   didn't apply in this case?

8                   MR. FARLEY: That is correct.

9                   The second prong of the Kentucky Supreme  
10   Court's test is whether or not the actions of the  
11   Respondent in this case or the occupant of the home  
12   would have been foreseeable by the police officers  
13   before they knocked and announced their presence.

14                   Now, the problem with the foreseeability  
15   test --

16                   JUSTICE GINSBURG: Why is -- why is that  
17   subjective? Why isn't that, wouldn't it be foreseeable  
18   to a reasonable police officer similarly situated?

19                   MR. FARLEY: Well, Justice Ginsburg, it --  
20   it isn't directly a subjective inquiry. However, police  
21   officers are trained to expect and foresee illegal  
22   activity so that they may carry out the duties of their  
23   job in protecting the citizens. So under a  
24   foreseeability test, a police officer will always  
25   foresee illegal activity in response to his actions. Be

1 it walking down the street or knocking on your door, a  
2 reasonable officer will always foresee illegal activity,  
3 and for that reason, the Kentucky Supreme Court's test  
4 is completely unworkable.

5           Several of the other circuits and the lower  
6 courts have adopted tests that also attempt to add an  
7 extra exception, an unwarranted closure of the exigent  
8 circumstances exception that narrows the use of that  
9 exception by police officers. The test that the  
10 Commonwealth would propose is a simple lawfulness test.

11           Now, under this test, as long as an officer  
12 behaves lawfully, there should be no suppression of  
13 evidence seized after an otherwise reasonable search --

14           CHIEF JUSTICE ROBERTS: So, you have an  
15 apartment building where the police know from experience  
16 there is a lot of illegal activity, a lot of drugs, drug  
17 transactions. Every 2 weeks they walk through and knock  
18 on every door and wait for evidence of the destruction  
19 of -- of -- of drugs. Is that all right?

20           MR. FARLEY: Well, there's -- I would say  
21 yes, if there is probable cause as well as --

22           CHIEF JUSTICE ROBERTS: Well, the probable  
23 cause, of course, comes when they hear the, you know,  
24 flushing and, you know, the hiding or whatever behind  
25 the door.

1                   MR. FARLEY: Well, I would assert that there  
2 are -- there are two separate issues here. You must  
3 have probable cause separate from the existence of  
4 exigent circumstances. In this case there was probable  
5 cause due to the smell of marijuana.

6                   JUSTICE GINSBURG: They go to the apartment  
7 building and they sniff at every door, and when they  
8 sniff, when a strong smell of marijuana emanates from  
9 the door, then they go through this routine, but they do  
10 it as a matter of every 2 weeks, as the Chief said, as a  
11 routine matter. They don't just knock on every door,  
12 but they knock on the doors where they smell marijuana,  
13 and they do that just as a routine, in all the buildings  
14 where they suspect there may be drug -- drugs being  
15 stashed.

16                  MR. FARLEY: Justice Ginsburg, under a  
17 simple lawfulness test, since the officers have not  
18 violated the Fourth Amendment prior to the exigency  
19 arising, there would be no need to suppress any  
20 evidence. That would be perfectly fine for the officers  
21 to do that. It may not be the most --

22                  JUSTICE SOTOMAYOR: -- to the Chief Justice  
23 when he said -- - and I think this was the Solicitor  
24 General's position -- that the police can routinely  
25 knock at a door and wait to see if they hear a toilet

1 flushing. I -- I've taken it out of this case but --  
2 because I don't know what noise means. But your answer  
3 would be yes?

4 MR. FARLEY: Yes, if -- if probable cause  
5 exists.

6 JUSTICE SOTOMAYOR: Well, why -- why do you  
7 need the probable cause inquiry? What does it have to  
8 do with anything?

9 MR. FARLEY: Well, under the Fourth  
10 Amendment for a reasonable warrantless search to occur,  
11 a police officer must have --

12 JUSTICE SOTOMAYOR: Before they can go in --

13 MR. FARLEY: Yes. The police officers must  
14 have --

15 JUSTICE SOTOMAYOR: -- because they have  
16 just heard the toilet flushing?

17 MR. FARLEY: They must have probable cause  
18 coupled with exigent circumstances.

19 CHIEF JUSTICE ROBERTS: I'm sorry. I think  
20 I have got two different probable causes that's  
21 caused -- causing me some confusion. I understand their  
22 requirement of probable cause, and that they hear sound  
23 of evidence being destroyed and therefore enter. Is  
24 that -- or are you talking about the probable cause to  
25 think there's something going on in the first place?

1                   MR. FARLEY: There are two separate issues  
2 here. They must have probable cause aside from exigent  
3 circumstances. Then they must also have a reasonable --

4                   JUSTICE KENNEDY: To knock on the door?  
5 They must have probable cause to knock on the door?

6                   MR. FARLEY: No, Justice Kennedy. They can  
7 just --

8                   JUSTICE KENNEDY: Take us --

9                   MR. FARLEY: -- they could knock on the  
10 door. However --

11                  JUSTICE KENNEDY: Take us through it -- take  
12 us through it chronologically. The policeman is walking  
13 through the hallway, he has no probable cause. He --  
14 he --

15                  MR. FARLEY: He could knock on the door.

16                  JUSTICE KENNEDY: He smells marijuana --

17                  MR. FARLEY: The smell of --

18                  JUSTICE KENNEDY: -- then he knocks on the  
19 door. When does the probable cause arise and when must  
20 it arise?

21                  MR. FARLEY: Well, the smell of marijuana  
22 would give probable cause to obtain a search warrant.  
23 Once he knocks on the door and hears noises consistent  
24 with the destruction of physical evidence, then an  
25 exigency has arisen. Now the officer has both probable



1     cause and an exigent circumstance --

2                   JUSTICE KAGAN:   But I don't understand why  
3     the smell of marijuana is necessary.  This goes back to  
4     what Justice Sotomayor was saying, you don't need  
5     probable cause to knock on a door.  Knocking on a door  
6     is perfectly lawful.  So, if there's just a lawfulness  
7     test, the knock is fine.  And then when you hear  
8     whatever it is that you hear that you think creates  
9     exigent circumstances, whether it's a toilet flushing or  
10    whether it's just noise, that too gives you the ability  
11    to go right in.

12                  So -- so if it's just lawfulness, you don't  
13    need the marijuana smell even, do you?

14                  MR. FARLEY:   Well, I think -- I think we're  
15    confused.  In order to enter with exigent circumstances,  
16    you must also have separate probable cause, and --

17                  JUSTICE KAGAN:   Probable cause beyond  
18    thinking that the evidence --

19                  MR. FARLEY:   Beyond the reasonable belief --

20                  JUSTICE KAGAN:   -- is being destroyed?

21                  MR. FARLEY:   Yes.  Correct.

22                  JUSTICE KAGAN:   Okay.

23                  MR. FARLEY:   That is correct.

24                  JUSTICE SCALIA:   It might just be somebody  
25    going to the toilet, right?

1                   MR. FARLEY: It could be. It could be. It  
2 could very well be.

3                   JUSTICE SCALIA: So, you have to suspect  
4 that the reason the toilet is flushing is somebody is  
5 trying to get rid of evidence. And in order for that to  
6 be the case, you have to have smelled marijuana?

7                   MR. FARLEY: Yes, Justice Scalia, you're  
8 absolutely correct.

9                   CHIEF JUSTICE ROBERTS: So there's only one  
10 probable cause, right?

11                  MR. FARLEY: Yes.

12                  CHIEF JUSTICE ROBERTS: Okay.

13                  MR. FARLEY: Yes. The exigent circumstances  
14 is a reasonable belief based upon the totality of the  
15 surrounding circumstances. Here, given that the  
16 officers had a reasonable belief that they were chasing  
17 a fleeing felon, they had a reasonable belief that this  
18 was the doorway he had entered, then you couple that  
19 with the noises that they heard, they testified were  
20 based on their training --

21                  JUSTICE GINSBURG: And may we just --

22                  MR. FARLEY: -- and experience.

23                  JUSTICE GINSBURG: Mr. Farley, may we just  
24 go back over -- you're putting in the fleeing felon, but  
25 as far as I understand from this record, it was never

1 shown that the dealer that the police were following was  
2 aware that he was following and that he was fleeing from  
3 them. I mean, this is the -- it's not part of the  
4 question you presented, because we've granted only on  
5 the exigent circumstances, but I didn't think that there  
6 was -- the dealer wasn't called and he wasn't asked did  
7 you even know that the police were following you?

8 MR. FARLEY: That -- that's correct, Justice  
9 Ginsburg. However -- and -- we cannot divorce the  
10 officers' chase of this suspect, regardless of whether  
11 he knew of their hot pursuit or not, we cannot divorce  
12 those facts from what the officers knew when they  
13 knocked on the door.

14 CHIEF JUSTICE ROBERTS: Sure, you can.  
15 There's nothing illegal about walking down the hall and  
16 knocking on somebody's door; and if as a police officer  
17 you say, but I smell marijuana, and then you hear the  
18 flushing, then there's probable cause. You don't need  
19 any business about the dealer and the breezeway and all  
20 that at all.

21 MR. FARLEY: Certainly. Certainly, Mr.  
22 Chief Justice. You're absolutely correct. I was -- I  
23 was just speaking in terms of this case, saying that  
24 there were -- there was ample evidence that exigent  
25 circumstances existed here, coupled with the probable

1     cause.

2                   JUSTICE SOTOMAYOR:   And in your view --

3                   JUSTICE GINSBURG:   Question -- may I ask a  
4     question that goes back to what you said?  You have  
5     clarified very nicely that there has to be probable  
6     cause to think that there's something wrong going on in  
7     the -- the apartment; and you said that is, at that  
8     point when they -- the marijuana strong smell comes from  
9     the door, at that point police could go and get a  
10    warrant.  Then they don't have to, because then they  
11    knocked on the door.

12                   We start out with a strong presumption that  
13    the Fourth Amendment requires a warrant, a strong  
14    preference for getting the warrant.  So why in this  
15    situation wouldn't the first response of the police be,  
16    instead of knocking -- because once they knock they  
17    alert the people in there -- let's get a warrant; we'll  
18    come back?

19                   MR. FARLEY:   Well, the officers testified  
20    under these circumstances that they believed that they  
21    were in hot pursuit of this felon.  So at the time they  
22    were at the door they believed he had entered this  
23    apartment and was aware of their presence and was  
24    destroying evidence of his deal of crack cocaine, so  
25    this is an evolving --

1 JUSTICE SOTOMAYOR: Counsel, why was -- how  
2 does this holding by us not become a simple warrantless  
3 entry in any drug case, meaning police knock on the  
4 door, suspect doesn't answer it, gets up and moves to  
5 their bedroom? Because there's no noise that was  
6 described by this police officer. It was simply not  
7 answering the door and moving. So if that's all it  
8 takes, any police officer will come in and say: In my  
9 experience, most drug dealers destroy the evidence when  
10 we knock.

11 MR. FARLEY: Well --

12 JUSTICE SOTOMAYOR: Aren't we just doing  
13 away with Johnson? And aren't we just simply saying  
14 they can just walk in whenever they smell marijuana,  
15 whenever they think there's drugs on the other side?  
16 Why do we even bother giving them a -- a warrant?

17 MR. FARLEY: Well, I would disagree with  
18 you. I think that when determining whether an exigent  
19 circumstance exists, you look at the totality of the  
20 circumstances. So -- and there would be a myriad of  
21 cases in which a court would determine that, simply  
22 based upon the testimony or the noises that were heard,  
23 with no surrounding circumstances, that exigent  
24 circumstances may not have existed.

25 JUSTICE SCALIA: What if -- what if the

1 defendants here had not flushed the evidence down but  
2 had answered the door and said, "Yes?"

3 Would the policeman have been able to do  
4 anything just because they had smelled marijuana?

5 MR. FARLEY: They could have sought a  
6 consensual encounter with the occupant.

7 JUSTICE SCALIA: Oh, yes, but they say: Oh,  
8 heck, no, you can't come in; do you have a warrant?

9 MR. FARLEY: Then the officers would not  
10 have been able to force entry.

11 JUSTICE SCALIA: So basically the -- the  
12 police were taking advantage of the stupidity of the  
13 criminals, is that right? That's terrible, that's not  
14 fair, is it?

15 MR. FARLEY: Well, I don't if I -- I don't  
16 know that I would phrase it -- there is no -- there is  
17 not a requirement to inform an occupant of a right to  
18 denial. However, the officers could not have forced  
19 their way into the home. That would have made this a  
20 case like Johnson.

21 JUSTICE SOTOMAYOR: What if the officers had  
22 simply knocked, said we're going to kick the door in if  
23 you don't open it?

24 MR. FARLEY: I believe that's still fine  
25 under a lawfulness test, unless the occupant of the home

1 submits to that show of authority and comes to the door  
2 and allows entry. Now, if --

3 JUSTICE SCALIA: Well, after -- after  
4 they've heard the movement inside or the flushing or  
5 whatever, you can't just kick it in because you've  
6 smelled marijuana. Can you do it, because you -- you  
7 knock on the door because you smell marijuana, nobody  
8 answers, and you kick the door in?

9 MR. FARLEY: Well, I believe that the noises  
10 that they heard were consistent with destruction of  
11 physical evidence based upon --

12 JUSTICE SCALIA: Yes, but without that  
13 noise. Just --

14 MR. FARLEY: No, no.

15 JUSTICE SCALIA: No, of course not.

16 MR. FARLEY: So no, no, of course not. They  
17 would have to obtain a warrant at that point. If the  
18 person came to the door and denied them consent, they  
19 would have to obtain a warrant. If the person did not  
20 come to the door and made -- no exigency arose, then the  
21 officers would still have to go and obtain a warrant.

22 JUSTICE KENNEDY: But this may be a bit  
23 rudimentary, but can you tell me why isn't the evidence  
24 isn't always being destroyed when the marijuana is being  
25 smoked? Isn't it being burnt up?

1 (Laughter.)

2 MR. FARLEY: I -- Justice Kennedy, I -- I  
3 would tend to -- I would tend to agree with you.  
4 However, I know this Court in Johnson stated that the  
5 smell of burning opium was not the destruction of  
6 evidence, and the only thing they could have obtained  
7 would have been the fumes or the vapors. I tend to  
8 agree -- disagree with that personally. However, from a  
9 legal viewpoint. The simple smell of burning marijuana  
10 is not --

11 JUSTICE KENNEDY: So the distinction is  
12 being destroyed as opposed to being consumed?

13 MR. FARLEY: Correct, that is -- that is  
14 correct.

15 JUSTICE GINSBURG: How is it -- you mention  
16 Johnson.

17 MR. FARLEY: Yes.

18 JUSTICE GINSBURG: And I think the other  
19 side says it was the same thing except it was a hotel  
20 room instead of an apartment building. The police  
21 smell, in that case it was -- what was it?

22 MR. FARLEY: Well, what occurred in Johnson,  
23 I believe, is -- is completely different than what  
24 occurred here. What occurred in Johnson was the  
25 officers forced their way into the occupant's apartment



1 -- the occupant's hotel room, and then said: Consider  
2 yourself under --

3 JUSTICE GINSBURG: Didn't they smell  
4 marijuana or opium or something?

5 MR. FARLEY: Well, they did, and they  
6 knocked on the door, and she came to the door and  
7 they -- they forced their way in. There was no -- there  
8 was no "let us in," there was no demand for entry, there  
9 was no even ask for consent to enter. They then said:  
10 Consider yourself under arrest. They searched, and then  
11 held her under arrest based upon the evidence that they  
12 obtained.

13 JUSTICE GINSBURG: You left out one thing.  
14 I thought they heard rustling noises before they  
15 attempted to get into the apartment -- into the hotel  
16 room. There was something about noises.

17 MR. FARLEY: Well, I believe they heard  
18 sounds when they knocked on the door. But she actually  
19 came to the door and the officers forced entry. Here we  
20 don't have that. We have no forced entry. These are  
21 two different circumstances. Johnson, an exigency did  
22 not exist. Here an exigency does exist.

23 If there are no further questions, I would  
24 like to reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Farley.

2 MR. FARLEY: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. O'Connell.

4 ORAL ARGUMENT OF ANN O'CONNELL,  
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
6 SUPPORTING THE PETITIONER

7 MS. O'CONNELL: Mr. Chief Justice, and may  
8 it please the Court:

9 If police officers act lawfully in  
10 conducting their investigation, they may respond to any  
11 exigencies that arise. It is up to police officers to  
12 determine how they will collect evidence in any given  
13 case as long as they stay within the confines of the  
14 Fourth Amendment. Although securing a warrant --

15 JUSTICE SOTOMAYOR: Could you -- does a  
16 ruling in this case that any lawful conduct by the  
17 police mean that the police knock, somebody gets up on  
18 the other side and walks through a closed door, and  
19 closes a door in the back, and police say in my  
20 experience it's -- it's consistent with the destruction  
21 of property that drug dealers will go into a closed room  
22 to get rid of it.

23 Is that enough?

24 MS. O'CONNELL: I don't think so, Justice  
25 Sotomayor. I think that in any case --

1 JUSTICE SCALIA: Why -- why not? I mean  
2 people -- you know, when there's a knock on -- on the  
3 door, is the normal human reaction to walk into the  
4 other room and shut the door?

5 MS. O'CONNELL: Well, a person might not --

6 JUSTICE SCALIA: That's peculiar behavior,  
7 isn't it?

8 MS. O'CONNELL: A person doesn't have to  
9 answer the door. A person might come to the door, they  
10 might also ignore whosoever at the door. Both of those  
11 options are fine.

12 JUSTICE SCALIA: Is that a common  
13 experience, that you knock on a door and all you hear is  
14 somebody walking out of the room and shutting a door?

15 MS. O'CONNELL: I mean, I -- I guess that a  
16 person is entitled to do that.

17 JUSTICE SCALIA: I don't recall it ever  
18 happening to me, but maybe -- maybe I'm a likable fellow  
19 and people open the door.

20 (Laughter.)

21 MS. O'CONNELL: I mean, I think that that --  
22 that's certainly a lawful option that somebody has when  
23 the police officers knock at their door. And certainly  
24 in this case --

25 JUSTICE SCALIA: They could say: Go away.

1 They could do a lot of stuff. But walk in the other  
2 room and shut the door?

3 MS. O'CONNELL: That's --

4 JUSTICE SCALIA: Strange.

5 MS. O'CONNELL: I guess some people might do  
6 that if they don't want to give consent to police entry.  
7 I think that in order to go in based on an exigent  
8 circumstance the police would have to be able to  
9 articulate to a court that they objectively, reasonably  
10 believed that there was destruction of evidence  
11 occurring inside.

12 JUSTICE GINSBURG: And what was that here?  
13 Because it is kind of vague. They heard movement. What  
14 kind -- what kind of movement? It said nothing about a  
15 toilet flushing --

16 MS. O'CONNELL: Justice Ginsburg, it's our  
17 position that the Court should assume that there was an  
18 exigency in this case.

19 In the Respondent's brief in opposition, he  
20 argued that there was insufficient evidence of exigency.  
21 The Court nonetheless granted cert on the question of  
22 whether a police-created exigency would be okay under  
23 the Fourth Amendment. The Solicitor General believes  
24 that the Court should assume there was an exigency, and  
25 if it agrees with Kentucky on the question presented and

1 then reverses, it should remand to the Kentucky Supreme  
2 Court for a determination of whether an exigency  
3 existed.

4 The trial court in this case certainly found  
5 that the movement inside of the apartment was enough for  
6 the officer to reasonably conclude that somebody inside  
7 was destroying evidence. The Kentucky Supreme Court  
8 assumed that that was so in order to reach the question  
9 presented in this case that the Court granted cert on.

10 JUSTICE KAGAN: Ms. O'Connell, if I could  
11 ask you about the government's proposed standard: You  
12 say that as long as each step in the police conduct is  
13 lawful, that's sufficient, and each step would -- the  
14 way the Fourth Amendment works, each step, we're asking,  
15 essentially, whether each step is reasonable.

16 What some courts have done in addition to  
17 that -- and this was not the approach of the court  
18 below -- but what some courts have done is to say, we  
19 also ask a more holistic reasonableness question. We  
20 say: Is the whole process by which the police operated  
21 with respect to this person reasonable? So, for  
22 example, we might say, you know: Was there time to get  
23 a warrant or did it look like the police were just --  
24 they preferred not to have to deal with a magistrate?

25 So what's wrong with that sort of standard?

1 In addition to asking whether each step is reasonable,  
2 to say: Look, is the whole pattern here of what the  
3 police did to come up with this evidence reasonable?

4 MS. O'CONNELL: I think the problem with  
5 that test, Justice Kagan, is that police officers have  
6 options of how they can conduct searches and seizures.  
7 Getting a warrant is one way that they could do that.  
8 Getting consent to conduct a search or a seizure is  
9 another way. There's no justification in this Court's  
10 precedents for requiring police officers to choose one  
11 of those options over another if both options are  
12 lawful.

13 In this case, the police officers knocked on  
14 the door, not sure which apartment the person that they  
15 were pursuing fled into, in order to determine whether  
16 that was the correct apartment. There's no reason why  
17 they needed to get a warrant before knocking on the door  
18 and seeking cooperation of the people inside.

19 JUSTICE KENNEDY: Is it your position that  
20 the police can do anything that's lawful, even if the  
21 purpose of doing so is to create exigent circumstances?

22 MS. O'CONNELL: Yes, I think that under this  
23 Court -- the way that this Court has interpreted Fourth  
24 Amendment warrant exceptions, as long as there is no  
25 violation of the Fourth Amendment, that is okay. The

1 police officers can rely on any ensuing exigency.

2 JUSTICE KENNEDY: The -- the question  
3 presented in the blue brief used the word  
4 "impermissible," and we're talking about unlawful. I  
5 take it that there is a difference in those, or no  
6 difference?

7 MS. O'CONNELL: Well, yes, there is a  
8 difference. I think that that comes up in Respondent's  
9 argument that if there was an impermissible demand for  
10 entry -- for example, if the police officer said, I have  
11 a warrant, let me in, even though he didn't, as in  
12 Bumper v. North Carolina -- that that could still be  
13 okay under a lawfulness test as long as the suspect  
14 reacted by destroying evidence instead of by coming to  
15 the door like in Bumper or Johnson and going about  
16 with --

17 JUSTICE BREYER: What are the objections to  
18 adding in the alternative, "or in bad faith"?

19 MS. O'CONNELL: Justice Breyer, the  
20 objection to that is simply that in all cases that are  
21 founded upon probable cause that are not programmatic  
22 searches that are conducted without any individualized  
23 suspicion, this Court has repeatedly rejected prongs of  
24 a Fourth Amendment test that -- that rely on the  
25 subjective --

1 JUSTICE BREYER: Objectively? I mean, what  
2 we're trying to rule out is they -- they hitch -- they  
3 get this bright idea, the police: We'll go knock on  
4 every door. So what about that, objectively determined  
5 bad faith.

6 MS. O'CONNELL: I'm sorry, I don't --

7 JUSTICE BREYER: My point is a solely  
8 unlawfulness test would allow the police to get into the  
9 habit of just knocking at every door, but if you say  
10 that also, it has to survive a bad faith test, where bad  
11 faith is objectively, not subjectively, determined, then  
12 you will rule out the possibility of the police  
13 hatching -- which I don't know if they would, but  
14 hatching such a plan.

15 MS. O'CONNELL: I guess that it's not  
16 totally clear what bad faith would mean in this context.

17 JUSTICE BREYER: Well, there are circuits  
18 who have adopted a bad faith test in the alternative  
19 with other things than the word "unlawful." The Second  
20 Circuit uses only the word "unlawful," and I thought we  
21 took this case to iron out that discrepancy. And if we  
22 did, I would like to know your objection to ironing it  
23 out by taking the Second Circuit test but adding on an  
24 objectively determined bad faith rule.

25 MS. O'CONNELL: Justice Breyer, I don't -- I



1 don't know what it means to act in bad faith in a case  
2 like this as a police officer.

3 JUSTICE ALITO: Maybe it could mean having  
4 no reason for knocking on the door other than to create  
5 exigent circumstances.

6 MS. O'CONNELL: Well, Justice Alito, I think  
7 that it would be difficult to determine objectively  
8 whether that was the case. Certainly --

9 JUSTICE BREYER: Well, the police say, oh, I  
10 don't want to get a warrant. It's such a bore. We have  
11 other things to do. I have a great idea; let's knock at  
12 the door, and then as soon as he starts moving around, I  
13 know what he's going to the -- going into the bathroom  
14 means, and we'll hear that, and we'll be able to get in.

15 Hey, great idea.

16 Okay. Now suppose that's the record.

17 MS. O'CONNELL: I think that there's already  
18 a significant risk built into the Fourth Amendment that  
19 police officers, if they knock on the door and they  
20 don't hear somebody destroying evidence inside, they're  
21 going to have to leave and get a warrant. I think  
22 that's enough of a --

23 JUSTICE SCALIA: You don't know that they're  
24 destroying evidence unless you have reason to believe  
25 that there is contraband inside. I mean, the -- the

1 hypothetical is an unrealistic one. They knock on the  
2 door and somebody moves inside, that doesn't give them  
3 any --

4 JUSTICE BREYER: No, I mean to add: And in  
5 fact, there's probable cause.

6 JUSTICE SCALIA: Okay.

7 JUSTICE BREYER: In addition, he smelled the  
8 marijuana. I just was trying to stick to the relevant  
9 points.

10 JUSTICE SCALIA: Well, that's a different  
11 hypothetical. There's a hypothetical in which --

12 JUSTICE BREYER: All right. I add that to  
13 the hypothetical.

14 JUSTICE SCALIA: -- they knock on every door  
15 under which they smell marijuana.

16 JUSTICE BREYER: Correct. That's what I  
17 mean, and I don't always spell it out.

18 JUSTICE SCALIA: Perfectly okay.

19 MS. O'CONNELL: Right, and I think that  
20 there's -- the Court shouldn't be concerned, and  
21 certainly shouldn't be concerned enough to adopt a bad  
22 faith or a subjective motivation prong to a test that it  
23 creates --

24 JUSTICE SOTOMAYOR: But what makes that  
25 different than knocking on the door and saying, open the

1 door or I'm going to kick it in? You're saying that's  
2 lawful because until the person submits, you're  
3 suggesting there's no coercion in that whatsoever.

4 MS. O'CONNELL: That's true, and, Justice  
5 Sotomayor, to be clear --

6 JUSTICE SOTOMAYOR: So why wouldn't that  
7 objectively be bad faith if what we find out is they now  
8 have a tactic which is they go through this building and  
9 every time they smell marijuana, hash, or -- I don't  
10 know if crack cocaine smells or not when they're smoking  
11 it, but whenever they smell something, they just do  
12 that.

13 MS. O'CONNELL: I think the fact that if the  
14 person actually does what the police officer says and  
15 answers the door will mean that the evidence would be  
16 excluded as a coerced consent search is enough of a  
17 deterrent to that sort of conduct.

18 JUSTICE SOTOMAYOR: So there's no bad faith  
19 measure whatsoever in your --

20 MS. O'CONNELL: I don't think it's  
21 necessary.

22 JUSTICE SOTOMAYOR: -- analysis, and  
23 lawfulness is defined by actual physical seizure. So if  
24 we have cases that suggest something else, a command to  
25 submit, your argument would be lost, correct?

1 MS. O'CONNELL: I think that's right, if the  
2 person submits to the command.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 Ms. O'Connell.

5 Ms. Drake.

6 ORAL ARGUMENT OF JAMESA J. DRAKE

7 ON BEHALF OF THE RESPONDENT

8 MS. DRAKE: Mr. Chief Justice, and may it  
9 please the Court:

10 The odor of burnt marijuana, coupled with  
11 Officer Cobb's cursory and equivocal testimony about the  
12 sounds of movement he couldn't discern exactly and that  
13 his training and experience led him only possibly to  
14 conclude was consistent with the destruction of  
15 evidence, is insufficient to establish exigent  
16 circumstances.

17 CHIEF JUSTICE ROBERTS: Well, you're --

18 JUSTICE SCALIA: I'm sorry.

19 CHIEF JUSTICE ROBERTS: You're describing  
20 what you think the evidence was to support exigency, and  
21 the suggestion we have heard on the other side is that  
22 that's an issue that can be addressed on remand once we,  
23 according to the other side, correct the State court's  
24 error in that this -- you -- the police cannot create  
25 exigent circumstances.

1           So I -- I don't know that it's terribly  
2 relevant what the underlying facts about what they heard  
3 was. That will be relevant depending, or not, depending  
4 on what our opinion says.

5           MS. DRAKE: It's relevant because it goes to  
6 whether exigent circumstances existed. And as to the  
7 question of whether a remand would be appropriate in  
8 this case, the question of whether exigent circumstances  
9 existed is logically antecedent in any created exigency  
10 case.

11          CHIEF JUSTICE ROBERTS: No, it's -- it's not  
12 at all. The court said: I don't care whether exigent  
13 circumstances existed; you cannot create exigent  
14 circumstances; so I don't care whether they were or not.  
15 The legal standard is antecedent to the application of  
16 the facts.

17          MS. DRAKE: There's no point in delving into  
18 whether an exigency was created by the police if there  
19 is no exigency to begin with.

20          JUSTICE KENNEDY: Well, I -- I think the  
21 Court is interested in taking the case on the question  
22 whether or not the police may create exigent  
23 circumstances and use those exigent circumstances to  
24 enter. Now, whether or not there were exigent  
25 circumstances here because of the sound is -- is it

1 seems to me a subsidiary question.

2 MS. DRAKE: The other problem with remanding  
3 this case for further determination on this issue is, as  
4 this Court is aware, the procedural posture of this case  
5 is troubling. The case has already been dismissed.  
6 There is no potential for further proceedings here.  
7 There is no --

8 CHIEF JUSTICE ROBERTS: Oh, sure, there is.  
9 It was dismissed because the State Supreme Court held  
10 you can't bring this evidence in. If we say, oh, yes,  
11 you can, then the issue comes live again.

12 MS. DRAKE: That conclusion is dependent on  
13 the notion that in an indictment it's merged with the  
14 judgment such that a decision in the Commonwealth's  
15 favor in this case would vacate the decision of the  
16 Kentucky Supreme Court, which in turn vacates the  
17 underlying suppression order. But there is no authority  
18 for the notion that an indictment and a judgment merge  
19 as a matter of Kentucky law, and so a decision --

20 CHIEF JUSTICE ROBERTS: This is the argument  
21 you presented to us in the letter, right?

22 MS. DRAKE: Yes, Your Honor.

23 CHIEF JUSTICE ROBERTS: And, yet, we  
24 nonetheless decided to have argument?

25 MS. DRAKE: Yes, Your Honor.

1 CHIEF JUSTICE ROBERTS: So maybe it would  
2 be -- it's your case, but maybe it would be best to move  
3 on to the legal issue.

4 MS. DRAKE: If we move to the question of  
5 whether the police have created exigent circumstances,  
6 it's important that we're all operating on the same  
7 understanding of the facts in this case. This case does  
8 not involve a simple knock at the door, and -- and --  
9 and the distinction is important. In this case, at  
10 9:50 p.m., the officers banged on the door as loudly as  
11 they could.

12 JUSTICE SOTOMAYOR: Did the trial court make  
13 those findings? I know that you said it in your brief,  
14 and I thought I read the trial court record. I know  
15 they knocked loudly.

16 MS. DRAKE: Yes.

17 JUSTICE SOTOMAYOR: But what else did they  
18 do?

19 MS. DRAKE: Yes. And this is located at the  
20 appendix to the petition in the bottom of page 3a  
21 carrying on to 4a. The trial court found: Detective  
22 Maynard, who was accompanying Officer Cobb in the  
23 breezeway attempting to locate and arrest the suspect in  
24 question, banged on the door of the apartment on the  
25 back left of the breezeway, identifying themselves as

1 police officers and demanding that the door be opened by  
2 persons inside.

3           Officer Cobb testified at the suppression  
4 hearing, and this is at page 22 of the joint appendix:  
5 Detective Maynard made contact with the door, announced  
6 our presence, banged on the door as loud as we could,  
7 announced: "Police, police, police."

8           This is not the case where --

9           CHIEF JUSTICE ROBERTS: Where's -- no "open  
10 up." I thought you said earlier they said "open up"?

11           MS. DRAKE: Yes. Then Officer Cobb later  
12 goes on to explain, and this is on page 24 of the joint  
13 appendix: Detective Maynard with Sergeant Simmons we  
14 explained to them, referring to the occupants of the  
15 apartment, we were going to make entry inside the  
16 apartment.

17           CHIEF JUSTICE ROBERTS: Is that after --  
18 after the exigent circumstances or the alleged exigent  
19 circumstances were presented? That's after they heard  
20 what they thought, and I know you disagree, was the  
21 destruction of evidence?

22           MS. DRAKE: It's -- it's unclear from the  
23 trial court's factual finding what the order of events  
24 was. The trial court found, banged on the door of the  
25 apartment, identified themselves as police officers,



1 and --

2 JUSTICE SCALIA: Loudly. Is any of that  
3 unlawful? Is -- is -- is knocking loudly on the door  
4 unlawful?

5 MS. DRAKE: It's unreasonable conduct.

6 JUSTICE SCALIA: Is it -- if it unlawful?  
7 Is -- is saying "Open up, police," is that unlawful?

8 MS. DRAKE: Well, it's certainly not  
9 unlawful in the sense that it violates any provision of  
10 the penal code. But this is a Fourth Amendment case, so  
11 the question is whether it's reasonable.

12 JUSTICE SCALIA: Miss Drake, the problem I  
13 have is there are a lot of constraints on -- on law  
14 enforcement, and the one thing that -- that it has going  
15 for it is that criminals are stupid.

16 (Laughter.)

17 JUSTICE SCALIA: And we had a case some  
18 years ago in which the issue was whether the Washington  
19 police could enter buses arriving from -- from the south  
20 and -- and randomly ask passengers, do you mind if we  
21 look in your luggage? And the -- the -- the mules who  
22 were carrying marijuana were stupid enough to say: Oh,  
23 of course, just to show that they had nothing to fear.  
24 And an enormous number of arrests were -- were effected  
25 in that fashion.

1                   We didn't say that's not fair because you're  
2   taking advantage of the -- of the ignorance of these --  
3   these poor criminals. We said that's perfectly okay.  
4   And it seems to me the same thing is going on here.

5                   These people could have answered the door.  
6   There's a policeman knocking on the door. All he's  
7   saying is open the door, open the door, say, yes, what  
8   do you want? Say, you know, blah, blah, blah. They  
9   say, well, get a warrant. Shut the door.

10                  They didn't do that. But everything done  
11   was perfectly lawful. It's unfair to the criminal? Is  
12   that -- is that the problem? I really don't understand  
13   the problem.

14                  MS. DRAKE: I have two responses to Your  
15   Honor's question. The first is that -- and along with  
16   this notion that criminals are stupid and so that's why  
17   we get all these criminal cases, there is no difference  
18   between what happened in this case and how an innocent  
19   person would respond.

20                  Recall Officer Cobb's testimony is simply  
21   that after banging he heard movement. Any innocent  
22   person at 10:00 at night would have to move in order --

23                  JUSTICE ALITO: Could I ask you this? It  
24   might -- it might make a difference to me whether the  
25   police demanded entry prior to the time when the alleged

1     exigent circumstances arose. And the only testimony on  
2     this point that I am aware of is on pages 22 and 23 of  
3     the appendix when police banged on the door as loud as  
4     they could and announced police, police, police, and  
5     then Detective Maynard banged on the door and said this  
6     is the police.

7                     Now, is there any -- anything more in the  
8     record? Any evidence that they, prior to the time when  
9     they heard what they allegedly heard, they said open the  
10    door?

11                    MS. DRAKE: The portion of the Joint  
12    Appendix that I quoted to the Court, we explained to  
13    them we were going to make entry, appears on page 24.

14                    JUSTICE ALITO: Right.

15                    MS. DRAKE: So, if Your Honor keeps  
16    reading --

17                    JUSTICE ALITO: It starts -- it says we knew  
18    that there was possibly something that was going to be  
19    destroyed inside the apartment. At that point Detective  
20    Maynard -- this is after they heard the sounds, after  
21    they claim to have heard the sounds.

22                    MS. DRAKE: Yes. Officer Cobb's testimony  
23    suggests that the demand came after they heard the sound  
24    of movement. The finding by the trial court, however,  
25    is that this was all happening simultaneously and in

1 very quick fashion.

2 JUSTICE ALITO: Is there any -- is there any  
3 evidence of that? Did anybody else testify to what  
4 happened?

5 MS. DRAKE: No, Your Honor. Officer Cobb's  
6 testimony was -- was all the Commonwealth offered.

7 But the chronology of the demand is not  
8 dispositive in this case because the demand itself is  
9 not dispositive. The demand removes any doubt that the  
10 officers were not seeking a consensual encounter, but  
11 you still have the behavior of banging on the door.

12 JUSTICE ALITO: Well, does it -- does it  
13 turn on how loudly they knocked? If they just knock on  
14 the door and say this is the police, is -- is that -- is  
15 there anything wrong with that?

16 MS. DRAKE: It -- it -- it depends entirely  
17 on whether a reasonable person would interpret that  
18 behavior as the officer conveying the impression that  
19 entry was imminent and inevitable, and this feeds back  
20 to Justice Scalia's question which is, well, what --  
21 what is unreasonable about what the officers did here?

22 JUSTICE ALITO: What was there here to make  
23 a reasonable person believe that -- that entry was  
24 imminent and inevitable, if -- if all that's done is a  
25 knock on the door and they say police, police, police,

1    this is the police?  Maybe it turns on how loudly they  
2    spoke or how loudly they -- they knocked, is that the  
3    point?

4                   MS. DRAKE:  That is the point.  Those are  
5    all relevant criteria because in every Fourth Amendment  
6    case we're considering the totality of the  
7    circumstances.

8                   CHIEF JUSTICE ROBERTS:  It seems to me that  
9    you're trying to change the case.  I mean, this is not a  
10   case where they come in and, in effect, demand entry.  
11   My understanding is that the issue in the case is  
12   whether or not after a request for entry, they can then  
13   base probable cause and dispensing with the warrant  
14   based on what they hear from behind the door.

15                   Now, I know you think whatever they hear is  
16   perfectly innocent; but the issue is whenever they knock  
17   on the door, "police," or "can we come in" or whatever,  
18   and then they hear that -- the activity behind the door,  
19   they have reason and can -- and enter.

20                   Now, what you're -- it seems to me what  
21   you're arguing is well, they did something else.  They  
22   banged on the door, they yelled police; it wasn't simply  
23   knocking on the door and seeking entry.  And you may be  
24   right, again, on the facts, but it seems to me that's  
25   for -- for later on.

1 I want to know what your position is on  
2 whether they can assume, at least for me, they knock and  
3 say can we come in or knock and say police, no demand to  
4 get in.

5 MS. DRAKE: If I understand Your Honor's  
6 question, the officers are engaging in what we would  
7 call a true knock and talk. They're seeking -- they're  
8 on -- the scenario is such that no one would doubt  
9 they're attempting a consensual encounter.

10 Our position is because that behavior is  
11 reasonable, it is not made unreasonable by the fact that  
12 evidence may be destroyed, and so suppression would not  
13 be the remedy. But again --

14 JUSTICE BREYER: So you agree that -- that  
15 the court below is wrong because what they say as I read  
16 it is irrespective of how reasonably the police behave,  
17 if it is reasonably foreseeable that their tactic will  
18 create exigent circumstances -- and I would think it's  
19 reasonably foreseeable when you knock on the door very  
20 politely and say "the police" that somebody might shout  
21 out "hide the pot," all right?

22 That if that's reasonable foreseeable, says  
23 the court, then that violates the Fourth Amendment. But  
24 we have the Second Circuit that says as long as the  
25 police behaved unlawfully -- it -- lawfully, lawfully,

1 it does not violate the Fourth Amendment; and we have  
2 the First Circuit that has some kind of bad faith test  
3 plus an unreasonable or improper test; and we have the  
4 Fourth and Eighth circuits that yet have some different  
5 kind of test.

6 And one of the things I would be interested  
7 in hearing your view on at some point is just what the  
8 Chief Justice said; that assuming from your point of  
9 view this is a hypothetical case, nonetheless we would  
10 like your view on which of those tests or some other  
11 test is the appropriate test and why. That was the  
12 question he started with, and Justice Kennedy started  
13 with, and I also would be interested in your view on  
14 that.

15 MS. DRAKE: The appropriate test is the test  
16 that we propose. Under our test, the police act  
17 unreasonably when they convey the impression to an -- to  
18 a reasonable person that entry is imminent and  
19 inevitable. Our test follows directly from the Fourth  
20 Amendment requirement that people in their homes deserve  
21 precision.

22 By conveying the impression that entry is  
23 imminent and inevitable, the police are -- and they  
24 don't have judicial authority for doing that; that is,  
25 there's no warrant -- they are engaging in behavior that

1 would confuse an ordinary citizen and make him or her  
2 uncertain about whether the assertion of right to  
3 privacy and security in the home --

4 JUSTICE KAGAN: Well, Ms. Drake if that's  
5 the case, in some way you're agreeing with the  
6 government. You, too, are saying that -- that there's a  
7 lawfulness test. You're just disagree about what's  
8 lawful.

9 MS. DRAKE: And to the extent that lawful is  
10 defined as a synonym for unreasonable, and to the extent  
11 that there does not need to be a completed antecedent  
12 Fourth Amendment violation, we would agree. There is  
13 area of agreement between the Commonwealth and I and it  
14 is on the issue of this knock and talk. Of course,  
15 police officers need to have the investigative tool of a  
16 knock and talk. There's nothing wrong with an officer  
17 attempting to gain consensual entry; and our position is  
18 that that's not made unreasonable by factors outside the  
19 officer's control, no matter how foreseeable.

20 JUSTICE ALITO: So what took this outside of  
21 the category of the ordinary knock and talk?

22 MS. DRAKE: This is not a knock and a --  
23 knock and talk case, this is a knock and announce case  
24 or a knock and demand case, which is how the trial court  
25 characterized it. And the staff --



1 JUSTICE ALITO: Well, I don't know about the  
2 labels, but what did they -- what did the police do that  
3 went beyond would be permitted under your understanding  
4 of a pure knock and talk? It's -- it's the volume of  
5 the -- the knocking?

6 MS. DRAKE: Yes, it's the -- it's the  
7 banging, not knocking. It's announcement.

8 JUSTICE ALITO: Banging, not knocking?

9 MS. DRAKE: Banging, not a soft -- not the  
10 knock that you would expect a reasonable person to  
11 engage in, in the ordinary discourse with another  
12 person, or that you would expect from an officer  
13 attempting to gain consensual --

14 JUSTICE SCALIA: But I -- you -- you -- you  
15 might have considerable support on the Court for the  
16 proposition that if the exigent circumstance is created  
17 by unlawful activity by the police, which would include  
18 conveying the impression that they are about to kick the  
19 door in, then -- then you have a different case. But --  
20 but I thought the case we had before us is what if the  
21 police officers are behaving perfectly lawfully and  
22 they're not threatening to kick down the door, and they  
23 smelled the marijuana and then they hear the motion  
24 inside, does that justify their going in?

25 And that's what I thought we took the case

1 for, and that's a different question. You're trying to  
2 -- you're trying to make the police officers' actions  
3 unlawful, and I will stipulate that if their actions  
4 were unlawful you have a different case, and probably  
5 the evidence would have to be suppressed, but I didn't  
6 think we were here to decide that, whether they knocked  
7 too loud, whether they threatened to kick in the door.  
8 The opinion below says if they created the exigent  
9 circumstances whether they did so lawfully or  
10 unlawfully, they cannot go in -- and that's, that's the  
11 issue.

12 MS. DRAKE: What the officers did in this  
13 case is the functional equivalent of saying we're going  
14 to kick in the door. Now, I wouldn't go that -- that  
15 far, but it -- it's the functional equivalent of a knock  
16 and announce, which is exactly the behavior the police  
17 engage in when they are executing a warrant; and it is  
18 that behavior that conveys the impression that an  
19 occupant has no authority to keep the officers at arm's  
20 length.

21 JUSTICE SCALIA: That wasn't the basis for  
22 the decision below, though. The court below didn't say  
23 these police officers were behaving as though they had a  
24 warrant and were about to kick in the door. The opinion  
25 below just said, yes, there were exigent circumstances,

1 but they were the result of the police knocking on the  
2 door and saying we're the police.

3 MS. DRAKE: I don't disagree that the lower  
4 courts did not analyze the problem in this fashion, did  
5 not analyze the question in this fashion, but it's a  
6 legal question that calls for an examination of how a  
7 reasonable person would interpret the behavior, and  
8 so --

9 JUSTICE SOTOMAYOR: But what does that have  
10 to do with the -- the police officers' lawfulness? Now,  
11 I -- I grant you that attempting -- that there is  
12 something troubling about the police attempting to  
13 coerce entry as opposed to requesting entry; but as my  
14 colleagues have pointed out, it's not clear from this  
15 record which of the two the police did, in a loud voice  
16 or not.

17 You're saying just a loud knock, a scream,  
18 "Police," that that would be coercive? That's how I'm  
19 reading you.

20 MS. DRAKE: I --

21 JUSTICE SOTOMAYOR: Or -- or are you going  
22 further and trying to say that as a matter of fact the  
23 testimony's critically clear that they knocked loudly,  
24 said "Police," and said let us in or we're going to bust  
25 it?

1 MS. DRAKE: The factual record is clear.  
2 The -- Officer Cobb testified he banged as loud as  
3 possible. This is -- this not the normal knock that an  
4 officer engages in when he's seeking consensual --  
5 consent, you know, consent to search, and this is at  
6 10:00 at night. He's saying we announced, police,  
7 police, police, exclamation point; that -- that's how it  
8 appears in the record. Again --

9 CHIEF JUSTICE ROBERTS: So just assume for  
10 -- for my sake that the police comes to the door. It's  
11 not 10:00 at night, it's you know, 6:00 at night, knocks  
12 quietly on the door, and says we're the police, can we  
13 talk? And then there was the smell of marijuana. And  
14 then he hears the sounds that do convey to a reasonable  
15 police officer that evidence is being destroyed. At  
16 that point can they enter without a warrant?

17 MS. DRAKE: Yes.

18 CHIEF JUSTICE ROBERTS: Okay.

19 JUSTICE BREYER: But you said -- just add on  
20 to that. Look, the question that they raised which of  
21 the five tests currently being used by the U.S. court of  
22 appeals is proper? Now, you've said something about  
23 your view on that, but I would like you to say anything  
24 else you would like to say about that: Which of the  
25 five tests or some sixth test if you like, and you tell

1 me the words that you like us to use when we answer that  
2 question.

3 MS. DRAKE: I would like this Court to adopt  
4 the test that we have proposed.

5 JUSTICE BREYER: Which is?

6 MS. DRAKE: Which is that an officer acts  
7 unreasonably when he or she conveys the impression that  
8 entry into a home is imminent and --

9 JUSTICE BREYER: No, no, no. But the test  
10 you're using there, the key word there is unreasonable.

11 MS. DRAKE: Yes, Your Honor.

12 JUSTICE BREYER: Okay, and the reason you  
13 choose the word "unreasonable" rather than the Second  
14 Circuit's test of "unlawful" is?

15 MS. DRAKE: Because, frankly, I'm not sure  
16 what that means, and I think that's become clear in the  
17 context of this briefing. Does unlawful mean the police  
18 have had to violate a portion of the penal code? Does  
19 unlawful mean, as the Commonwealth is contending, that  
20 there has to be a completed Fourth Amendment violation?

21 CHIEF JUSTICE ROBERTS: You know -- you  
22 don't know what -- you don't know what unlawful means,  
23 but you know what unreasonable means?

24 MS. DRAKE: Yes. Unreasonable is the  
25 touchstone of every you know, Fourth Amendment case, and

1 so we're saying there does not have to be an antecedent  
2 completed Fourth Amendment violation. The question is,  
3 as is the case in every Fourth Amendment case, did the  
4 officers act --

5 JUSTICE SCALIA: Do you have any doubt that  
6 it's unlawful for a police officer to threaten to burst  
7 into a home?

8 MS. DRAKE: No, Your Honor.

9 JUSTICE SCALIA: So why do you need  
10 unreasonable? If, indeed, there -- there was a threat  
11 of imminent entry, we're going to bust down the -- if  
12 that was the threat, then it's unlawful, surely.

13 MS. DRAKE: Yes, and that's why my answer to  
14 Justice Kagan's question was to the extent that unlawful  
15 and unreasonable are synonyms, we would agree.

16 Now, if the Court is not terribly -- does  
17 not find our test convincing, the next-best test, we  
18 believe, is a foreseeability test.

19 JUSTICE GINSBURG: If your test is something  
20 novel -- Justice Breyer mentioned there are some five  
21 tests in the different circuits, and the foreseeability  
22 test is the one that the Kentucky Supreme Court used,  
23 but is your -- does your test coincide with the tests of  
24 any other circuits or is it different?

25 MS. DRAKE: Our test is a novel test. It

1 has not been, to my knowledge, considered by any of the  
2 other circuits.

3 JUSTICE BREYER: Your test, it's -- it's not  
4 wild. It just says unreasonable in the Fourth  
5 Amendment. Probably when they act lawfully, they are  
6 acting reasonably and not unreasonably, but it could be  
7 sometimes they're not. That's your view?

8 MS. DRAKE: That's correct, and by the  
9 way --

10 JUSTICE BREYER: No test. All right.

11 MS. DRAKE: We're not saying that -- we're  
12 essentially saying the police shouldn't act as though  
13 they have a warrant when they don't have one, which is  
14 exactly what they did in this case, and that proposition  
15 is not new. In Bumper, this Court made clear that if  
16 the police act as though they have a warrant when they  
17 don't have one, any consent would be coerced.

18 So reviewing courts are already making these  
19 determinations about how loud was the knock and how  
20 aggressive was the demand, simply in another context.  
21 By the other -- on the other hand, police officers are  
22 already receiving the same instruction that they would  
23 need in order to apply our rule, which is, don't act as  
24 though you have a warrant. Don't engage in the  
25 functional equivalent of a knock and announce if you do

1 not have prior judicial authority.

2 And what is appealing about our test, unlike  
3 the foreseeability test, which we believe it's a  
4 refinement of, is it allows for conduct by the police  
5 that's reasonable at its inception to remain reasonable  
6 regardless of the suspect's response, no matter how  
7 foreseeable.

8 CHIEF JUSTICE ROBERTS: What is -- what is  
9 an example of conduct that you would consider  
10 unreasonable resulting in suppression of the evidence  
11 that would not be unlawful?

12 MS. DRAKE: Well, it's very hard. It's very  
13 hard to conceive of where the daylight would be --

14 CHIEF JUSTICE ROBERTS: Right.

15 MS. DRAKE: -- between those terms,  
16 reasonable and unlawful, so long as unlawful doesn't  
17 mean violation of a penal code provision and so long as  
18 it doesn't mean, as the Commonwealth is suggesting, that  
19 there has to be -- that the defendant would have to  
20 first demonstrate that the police were seized in order  
21 to be able to convincingly argue that the search was  
22 unreasonable.

23 CHIEF JUSTICE ROBERTS: So you can't --  
24 can't give me one example of some conduct that's  
25 unreasonable under your test that would not be unlawful?



1 MS. DRAKE: I can't -- I can't think of one,  
2 Your Honor.

3 JUSTICE SCALIA: The problem is that as  
4 reasonable as the test is, it's not the test that was  
5 used by the Court below, and you want us to affirm the  
6 decision below, which simply said if the exigent  
7 circumstances are -- are the consequence of the police  
8 action, whatever the police action was -- lawful,  
9 reasonable, whatever -- the evidence has to be excluded.

10 Now, how can we affirm that decision as you  
11 want us to do, even -- even applying your test?

12 MS. DRAKE: Well, the factual record in this  
13 case is fully developed, and how a reasonable person  
14 would interpret the scenario is a mixed question of law  
15 and fact, which -- this Court would review the decision  
16 of the Kentucky Supreme Court in that regard de novo  
17 anyway. In that regard, it's no different than any  
18 other case that makes its way to this Court where this  
19 Court is asked to review the record, make a  
20 determination of how an ordinary person would interpret  
21 the officers' conduct.

22 It is simply unreasonable and unlawful for  
23 purposes of the Fourth Amendment for an officer to  
24 convey the impression that he has the authority of a  
25 warrant when he doesn't have one. And when that

1 prompts, as it obviously would, an occupant of a home to  
2 move, and then that movement is used as evidence that  
3 exigent circumstances exist and warrantless search is  
4 justified, if this Court were to, you know, adopt the  
5 framework the Commonwealth is arguing for, the exception  
6 to the warrant requirement would be the rule.

7 So we would ask this Court to affirm the  
8 decision of the Kentucky Supreme Court.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Farley, you have four minutes remaining.

11 REBUTTAL ARGUMENT OF JOSHUA D. FARLEY

12 ON BEHALF OF THE PETITIONER

13 MR. FARLEY: My time is short, so I would  
14 like to just make a few quick points.

15 I believe Mr. Chief Justice and Justice  
16 Kennedy were absolutely, absolutely correct. The  
17 question before this Court is: Can lawful police action  
18 impermissibly create exigent circumstances? And the  
19 answer to that question is no.

20 There is never a circumstance in which  
21 lawful police behavior under a Fourth Amendment analysis  
22 can impermissibly create an exigency. I would point the  
23 Court to *Hodari D.*, which I believe Justice Scalia wrote  
24 for the Court, that we should not punish police officers  
25 for attempted Fourth Amendment violations or Fourth

1 Amendment violations that do not reach fruition, because  
2 it does not serve the point of the exclusionary rule.

3 JUSTICE KAGAN: Mr. Farley, one of the  
4 points of the Fourth Amendment is to ensure that when  
5 people search your home, they have a warrant, and of  
6 course there are exceptions to that. But if there is  
7 one place where the warrant requirement has real force,  
8 it's in the home.

9 And I think that the concern here, and you  
10 have some strong arguments on your side, but the concern  
11 here is that your test is going to enable the police to  
12 penetrate the home, to search the home, without a  
13 warrant, without going to see a magistrate, in a very  
14 wide variety of cases, that all the police really have  
15 to say is: We saw pot, we heard noise. Or: We think  
16 there was some criminal activity going on for whatever  
17 reason and we heard noise.

18 How do you prevent that from happening? How  
19 do you prevent your test from essentially eviscerating  
20 the warrant requirement in the context of the one place  
21 that the Fourth Amendment was most concerned about?

22 MR. FARLEY: Well, Justice Kagan, I would  
23 disagree with you. I don't think that it would. I  
24 believe that what the Commonwealth is asking for is no  
25 more or no less than reviewing courts have done for

1 generations. You look to determine whether there was a  
2 Fourth Amendment violation, whether there was an  
3 unlawful entry, whether there was an unlawful seizure,  
4 or whether there was a coercion that then they gained  
5 consent for entry.

6 If those things occurred, they are clearly  
7 Fourth Amendment violations. There should be a  
8 suppression of the evidence. The exigent  
9 circumstances --

10 JUSTICE SCALIA: It wouldn't technically be  
11 a Fourth Amendment violation, would it, if the police  
12 gave the impression that they had a warrant and were  
13 about to kick in the door? Is that a Fourth Amendment  
14 violation in and of itself?

15 MR. FARLEY: I don't believe so.

16 JUSTICE SCALIA: So your -- the -- the  
17 unlawfulness test would not prevent that?

18 MR. FARLEY: No, Justice Scalia, it would  
19 not.

20 JUSTICE SCALIA: It would not? Oh. Maybe  
21 we have to come up with an unreasonable test, then.

22 MR. FARLEY: I believe under Hodari D., if  
23 the officers demand entry and there has been no response  
24 to that demand, there has no -- been no completion of  
25 the Fourth Amendment violation. The officers could

1 stand outside the door --

2 JUSTICE SCALIA: Well, it'd be okay for  
3 officers to do that? Pretend they have a warrant? Open  
4 the door or we'll kick it in. That's perfectly okay?

5 MR. FARLEY: I believe that there are --  
6 there are large restrictions and prohibitions to that,  
7 that officers are well aware of, because if the person  
8 does answer the door, the officers know, well,  
9 everything is going to be suppressed. Or it's --

10 JUSTICE SCALIA: You say that what they've  
11 done is not lawful. Why would it be suppressed?

12 MR. FARLEY: Well, if they demand entry and  
13 entry is given, that is then a Fourth Amendment  
14 violation, because they've demanded entry without a  
15 warrant. And in that case, suppression -- once they  
16 have entry, the evidence would be suppressed.

17 CHIEF JUSTICE ROBERTS: They can't gain  
18 entry by deception. They can't knock on the door and  
19 say, pizza, right?

20 MR. FARLEY: No.

21 CHIEF JUSTICE ROBERTS: No? No? Okay.

22 MR. FARLEY: We would just assert that under  
23 the lawfulness test, we aren't asking for anything more  
24 or less than this Court has done or other reviewing  
25 courts have done for generations, and this is a simple

1 Fourth Amendment analysis.

2           There was no demand in this case. This was  
3 a simple knock-and-announce case, regardless of the time  
4 of day. There was no coercion. There was no seizure.  
5 There was no consent given. Officers should not be held  
6 accountable for unlawful reactions by suspects.

7           Thank you.

8           CHIEF JUSTICE ROBERTS: Thank you, counsel.

9           You will have noticed that Justice Kennedy  
10 left the bench a few minutes early. He is going to  
11 Tucson to represent the Court as the circuit justice for  
12 the Ninth Circuit at the memorial service there. He  
13 will review the tapes and transcripts of the rest of the  
14 argument and fully participate in the decision.

15           This case is submitted.

16           (Whereupon, at 11:58 a.m., the case in the  
17 above-entitled matter was submitted.)

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